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IN THE

Supreme Court of the United States

October Term, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. McKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Monolith Portland Cement Company prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California in the above-entitled case.

Opinions Below.

The decision of the California Public Utilities Commission is reported in 62 California Public Utilities Commission Decisions 49.* Neither the decisions of the California Public Utilities Commission denying rehear-

*Because the California Public Utilities Commission Decisions may not be readily available to the Court, Petitioner is filing concurrently with this Petition ten copies of the advance sheet containing the Opinion.

ing nor the order of the California Supreme Court denying, without opinion, the Petition for Writ of Review are officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3).

The order of the California Supreme Court denying the Petition for Writ of Review was filed June 16, 1964. Petitioner's primary attack in that Court of the decision below was that Petitioner's rights under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment had been violated. This attack is amply demonstrated by the quotation from the Petition for Writ of Review set out in this Petition at page 6.* Under the applicable statute, California Public Utilities Code, section 1760, this attack required the Court to exercise its independent judgment both as to the law and the facts regarding the constitutional questions. Unavoidably, however, since the California Supreme Court denied relief to Petitioner without opinion, its determination against Petitioner of these important constitutional questions was not specifically articulated.

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*No formal record of the proceedings in the California Public Utilities Commission was transmitted to the California Supreme Court. (California Public Utilities Code, section 1756). The Petition for Writ of Review, together with its appendices; and the Reply to Answers to Petition for Writ of Review were the answers to the Petition, the only documents filed in the California Supreme Court and are submitted as the record in the case. *Rules of Supreme Court of United States*, Rule 23(1)(i). One certified and nine additional copies are fil 1 herewith.

The Petition for Writ of Review will be referred to herein as Petition for Review. The appendix to the Petition for Review, which has been certified by the California Public Utilities Commission, will be referred to herein as Petition For Review, Appendix.

Question Presented.

Whether the State of California and its agencies may constitutionally authorize lower intrastate railroad freight rates to some shippers than to other similarly situated shippers and localities for the same transportation service, solely because of a joint trackage agreement between two railroads which provides (as between the railroads) a surcharge-penalty against shipments originating in one locality; or whether such discrimination is repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 12, Section 21 of the California Constitution provides in pertinent part:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons . . ."

Section 453 of the California Public Utilities Code provides:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No pub-

lic utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 1757 of the California Public Utilities Code provides in pertinent part:

"No new or additional evidence may be introduced in the Supreme Court . . . The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State . . ."

Section 1760 of the California Public Code provides:

"In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Statement.

Petitioner, Monolith Portland Cement Company, operates a cement plant adjoining a railroad track between Mojave and Bakersfield, California—the mountain rail gateway between Northern and Southern California—which is owned by the Southern Pacific Company and

jointly operated by the Southern Pacific Company and its lessee, the Atchison, Topeka & Santa Fe Railway Company, as part of their intercontinental systems.

This controversy concerns the constitutionality of the establishment of reduced rail cement rates to three of petitioner's competitors, while denying the same basis of rates to petitioner for the same transportation service — the transportation of cement to common destinations, solely because of the Santa Fe-Southern Pacific trackage agreement.

Petitioner timely protested Santa Fe's publication of such rates as a violation of California's organic transportation law requiring non-discriminatory rates, and under California procedure, the California Public Utilities Commission suspended the rates in question and initiated an investigation (Calif. Pub. Util. Code, §§ 454-455). Following a hearing, the Commission found as a fact that all the actual costs and circumstances of transportation were the same for petitioner as for its competitors. However, the Commission concluded as a matter of law that notwithstanding such factual identity in transportation conditions, the proposed reduced rates in favor of petitioner's competitors were justified because of the collateral joint trackage agreement between the Santa Fe and Southern Pacific which imposed penalty payments upon Santa Fe for freight (such as petitioner's cement) originating on the leased track.

Following the Commission's decision (when it first became apparent that such proposed rates would be established on the supposed justification of the joint trackage agreement, notwithstanding the proven discrimination involved) petitioner exhausted its adminis-

trative remedy by petition for rehearing (Calif. Pub. Util. Code § 1731), and timely applied to the California Supreme Court for a writ of review (Calif. Pub. Util. Code § 1756) — the only legal procedure available under California law — alleging that the stated basis of the Commission's decision offended the Due Process and Equal Protection Clauses of the Fourteenth Amendment. [Petition for Review, pp. 3-4]* The California Supreme Court, notwithstanding this Court's many decisions proscribing the use of such trackage agreements to justify discriminatory practices (e.g., *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169 (1948), denied such petition, without opinion. [A certified copy of the denial is filed herewith, and is also printed as an appendix to this petition.]

The significant facts are undisputed. The Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Company are railroad common carriers which own and operate intercontinental railway systems. In each case, the railroad's western terminus is in California. Each railroad has its own trackage system, except for one short section of track between Mojave and Bakersfield, California, owned by Southern Pacific and used by Santa Fe. The original 50 year contract govern-

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*". . . Basically, petitioner maintains that the Commission denied petitioner the equal protection of the law and deprived it of its property without due process of law, in that it based its Decision herein complained of upon a legally erroneous principle . . .

* * * *

"Petitioner has no remedy except by this petition, and unless a Writ of Review is granted, petitioner will be denied the judicial review to which it is entitled under the Constitutions of California and of the United States." [Petition for Review, pp. 3-4]

ing Santa Fe's use of and payment for the use of the leased track (which was approved without public hearing in 1912)* expired January 1, 1962, and no new contract has been executed. The two railroads were in disagreement as to the terms of a new agreement, and submitted their dispute to the Interstate Commerce Commission, which has not yet acted. In the interim, the two railroads have agreed to continue to operate under the terms of the expired 1912 contract, and that the terms of any new arrangement shall be retroactive to January 1, 1962; and the Interstate Commerce Commission has approved maintaining the status quo, but has expressly refrained from passing on the merits of the railroads' controversy [Petition for Review, Appendix, Exhibits D, E].

The 1912 contract provided that as compensation for the use of Southern Pacific's track Santa Fe would pay a certain fixed rental, its prorata share of track operations' cost and taxes, and finally, as a surcharge, 60% of Southern Pacific's local rate for any traffic Santa Fe picked up or delivered along such track. [Opinion, page 57]. The constitutionality of using this 60% penalty-surcharge feature of the Santa Fe-Southern Pacific arrangement to justify otherwise discriminatory rates is the nub of the present case.

The sketch prepared by the California Commission and attached to its Decision to illustrate the locations

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Southern Pacific Railroad Co., et al., 1 C.R.C. 470, 471 (1912).

of the cement plants and railroad lines involved [Opinion, page 51], appears on the opposite page.* As shown by such sketch, and as found by the Commission, of the four cement plants involved Monolith is squarely between its competitors' plants and the northern market and is the most centrally located to furnish the cement needed for construction of the Feather River Acqueduct System — a joint State-Federal project. [Opinion, page 50].

Since cement is a standard commodity, transportation costs are the key to its market price [Opinion, pp. 50, 55], and a difference of a few cents per barrel is sufficient to divert a cement contract from one plant to another,** petitioner's competitors persuaded Santa Fe to reduce its rates for transportation from their more distant plants to common northern destinations (without lowering petitioner's rates proportionately) in order to offset petitioner's natural competitive advantage and permit such plants to penetrate the new, attractive market at petitioner's expense [Opinion, pp. 49, 50].

Petitioner contended that judged by all the traditional criteria for making such comparison, the standard of transportation for the carriage of cement from all Southern California cement plants was the same, and since the suspended rates were admittedly lower, mile for mile than petitioner's existing rates from Monolith north [Opinion p. 11], such rates were discriminatory.

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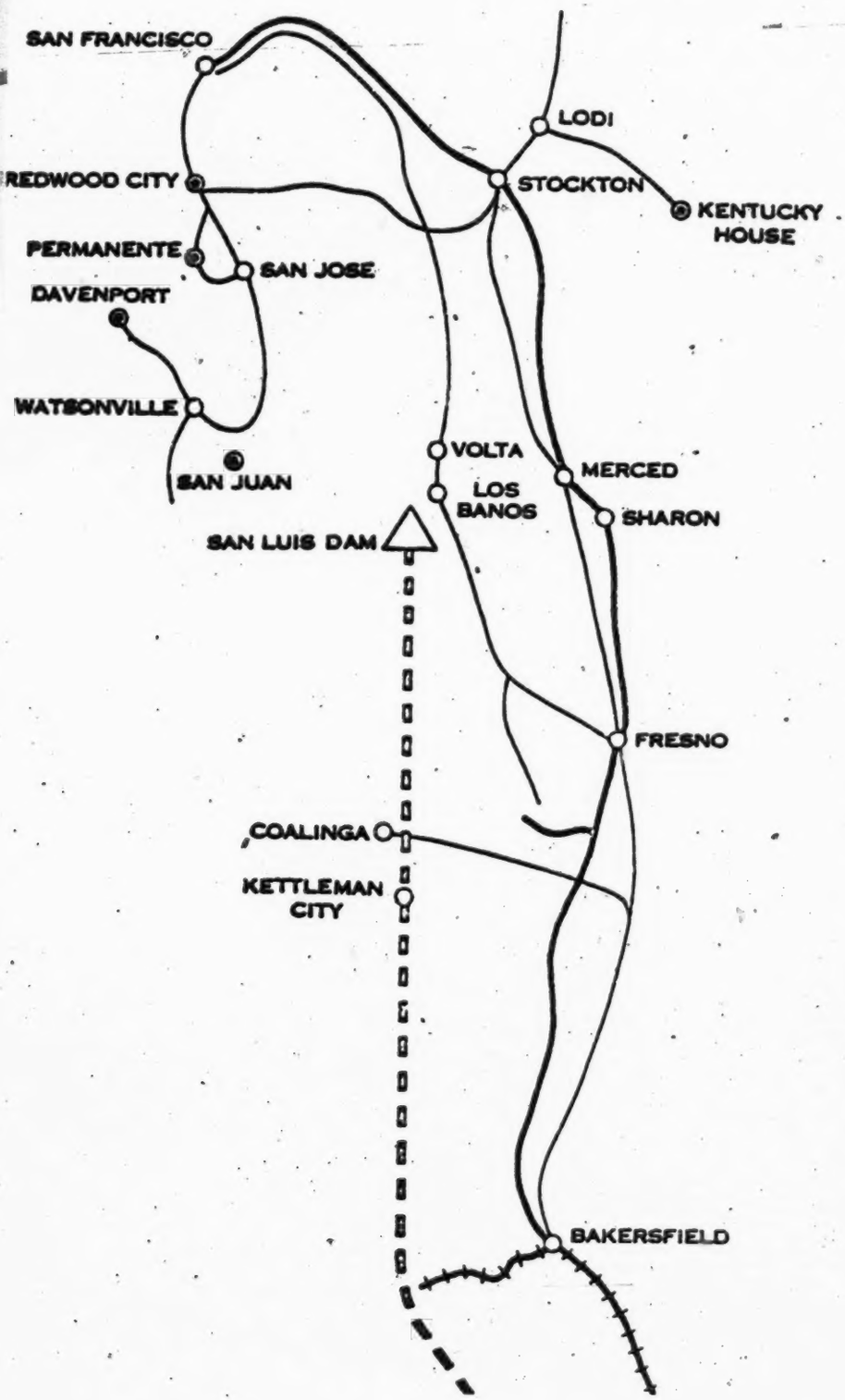
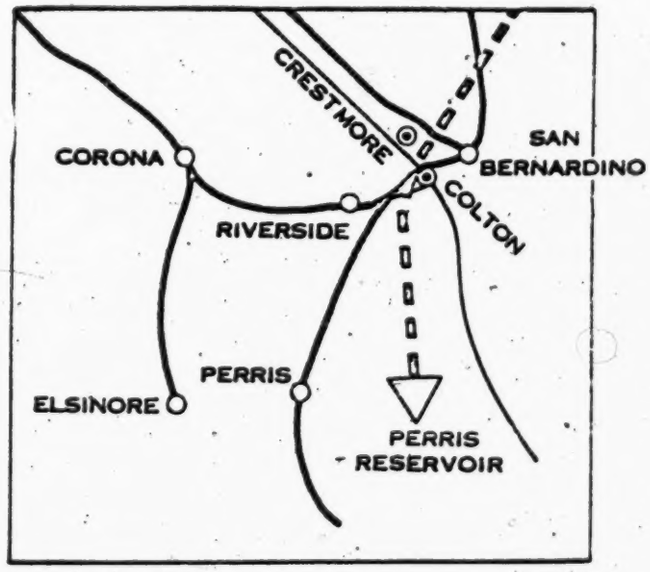
*This sketch was included in the original Public Utilities Commission decision served on the parties to the proceeding. It is referred to at page 51 of the advance sheet printing of the decision, but as pointed out at page 64 of the advance sheet it was omitted from the advance sheet printing.

**See *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 586 (1949).

APPENDIX "A"

CASE NO. I & S 7598





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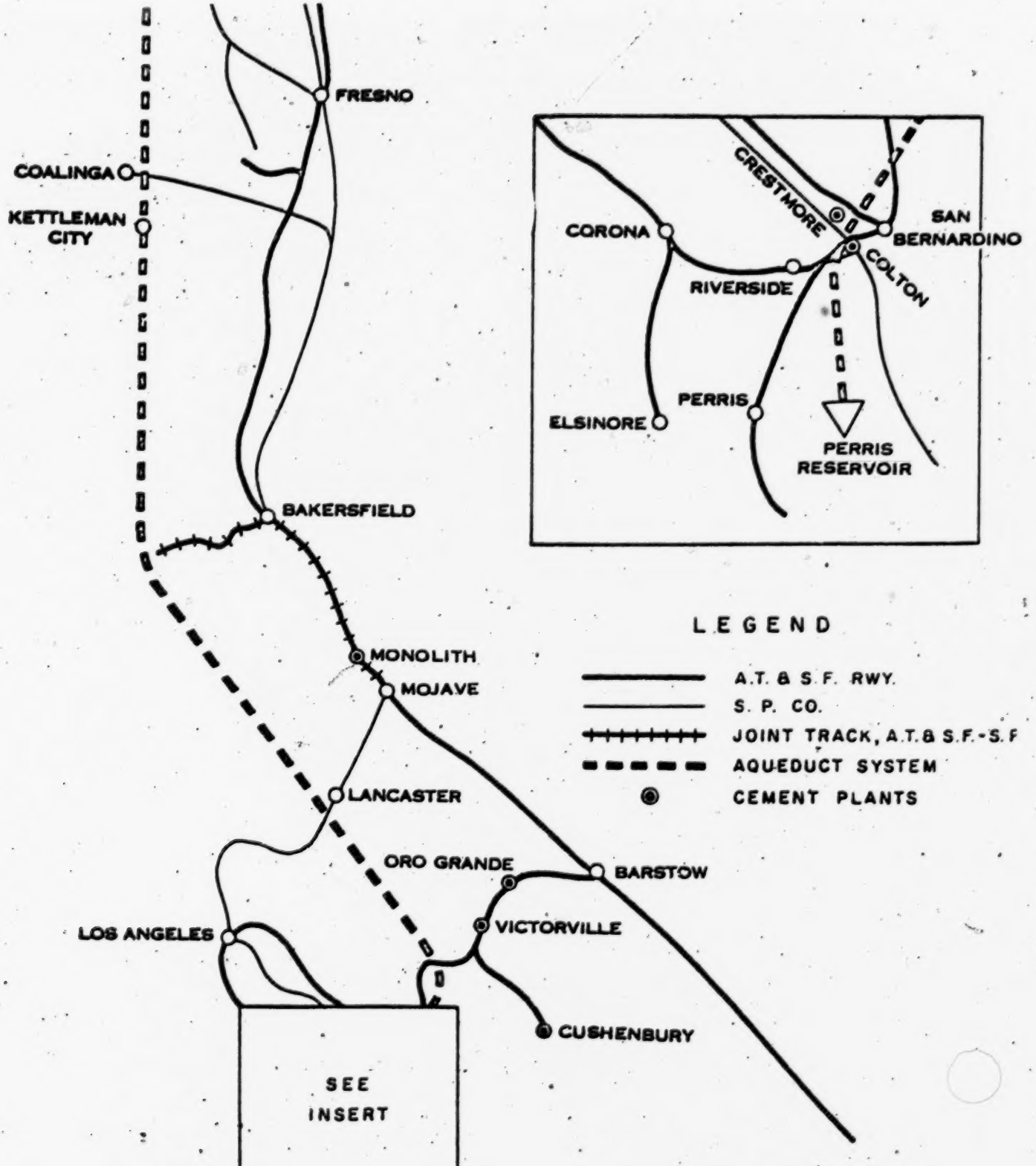
FRESNO
COALINGA
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BAKERSFIELD
MONOLITH
MOJAVE
LANCASTER
ORO GRANDE
BARSTOW
VICTORVILLE
LOS ANGELES
CUSHENBURY
SEE INSERT
CRESTMORE
SAN BERNARDINO
CORONA
COLTON
RIVERSIDE
PERRIS
ELSINORE
PERRIS RESERVOIR
LEGEND
A.T. & S.F. RWY.
S. P. CO.
JOINT TRACK, A.T. & S.F.-S.P.
AQUEDUCT SYSTEM
CEMENT PLANTS

The California Commission meticulously compared the proposed service to petitioner's competitors with service to petitioner, and agreeing with petitioner, found that under all the traditional factual criteria, all conditions of transportation were either identical or substantially similar [Opinion, 54-56];* found that petitioner's existing rates were higher than the proposed rates [Opinion p. 55-56]; but concluded that the 60% penalty trackage payments made by Santa Fe to Southern Pacific were properly assignable solely to petitioner,

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*More specifically, the Commission found that:

(1) *The transportation services are the same*—the services rendered in the transportation of bulk cement from the group mills "involve substantially the same services as are rendered in the transportation of bulk cement from Monolith";

(2) *The commodity is the same*—"Portland cement is a low-grade, heavy loading commodity produced to meet standard specifications, and both the group mills and Monolith produce such cement";

(3) *The cement plants are on a price parity*—"Each plant competes one with the other . . . : and no one of the producers can obtain a greater price for its cement than the other. Portland cement, except on rare occasions, is sold by the plants on an F.O.B. delivered basis and said plants bear the transportation charges";

(4) *Both rates are on the same volume basis*—"Respondent maintains volume rates from all of those plants to San Joaquin Valley subject to carload minimum weights of marked capacity of car used but not less than 150,000 pounds";

(5) *The route, track and mileage is identical*— ". . . from Monolith to the north the physical transportation from all of those plants to the San Joaquin Valley is identical";

(6) *The accessorial services are the same*—"The form of tender of shipments and the facilities for the tendering of carload shipments at those plants are substantially the same";

(7) *The probability for the generation of new business for Santa Fe by the new rates is the same*—"The evidence does not show that Monolith would not use Santa Fe nor make greater use of Santa Fe for the transportation of cement to San Joaquin Valley points if the rates from Monolith were to be reduced."

thus justifying the discriminatory rates. Thus, the sole predicate for such discrimination was the Santa Fe-Southern Pacific trackage arrangement.*

Simply stated, the thrust of the Commission's Decision is that the particular formula by which two railroads agree how a total annual track rental shall be computed can legally convert otherwise discriminatory rates for the same service to non-discriminatory rates.

Reasons for Granting the Writ.

The decision of the California Supreme Court, refusing to correct the authorization by the California Public Utilities Commission of plainly discriminatory railroad freight rates is in conflict with the decisions of this Court requiring the states to scrupulously observe the Constitutional guarantee of equal protection of the laws. *Ex Parte Virginia,* 100 U.S. 339; *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278; *Shelley v. Kraemer,* 334 U.S. 1; *Aaron v. Cooper,* 358 U.S. 1. This alone justifies granting a writ of certiorari. There is, however, an equally important reason for granting the writ. The California Supreme Court has failed—perhaps even refused—to follow the plain teaching of this Court's decision in *United States v. Baltimore & Ohio R. Co.,* 333 U.S. 169, in a context which is indistinguishable. Respect for the orderly resolution of disputed questions of federal law requires the correction of any such marked disregard of the Court's decisions.

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*As the *Opinion* acknowledges: (Opinion, p. 56.)

"Inasmuch as Respondent [Santa Fe] has suggested *no* other differences in transportation circumstances and conditions between the points involved, and because Monolith and Santa Fe vigorously disagree regarding the competency, relevancy and materiality of the expense [contract], it is necessary to consider . . . the contract . . ." (Emphasis added)

1. "It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances [citations] and that it applies to the exercise of all the powers of the state which can affect the individual or his property." *Hartford S.B.I. & Ins. Co. v. Harrison,* 301 U.S. 459, 461-462. Of course, the equal protection clause "does not preclude the states from resorting to classification for the purposes of legislation". *Colgate v. Harvey,* 296 U.S. 404, 422. "But the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' [citations]. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." *Colgate v. Harvey,* supra (296 U.S. at 423). The question always is: does the state's action arbitrarily and without genuine reason impose a burden upon one group of persons from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation. "*Mere* difference is not enough . . ." *Louisville Gas & E. Co. v. Coleman,* 277 U.S. 32; *Frost v. Corporation Commissioner,* 278 U.S. 515.

Of course, the action of a state regulatory commission, to which has been delegated legislative power, falls within the ambit of the equal protection clause, if its classifications offend against the rule, *Home Telephone Telegraph Co. v. Los Angeles,* 227 U.S. 278, as does a state judiciary which sanctions such deviation. *Shelley v. Kraemer,* 334 U.S. 1.

Here, the sole ground of the California Public Utility Commission's approval of the discriminatory rates in question to petitioner's competitors was that under the Santa Fe-Southern Pacific joint trackage arrangement there was a surcharge-penalty assessed by the railroads against freight from petitioner's locality.

But the existence of such an arrangement between the railroads is not a "genuine reason" why one group of shippers should pay higher rates than another group otherwise similarly circumstanced and thus redeem the carrier's private, collateral contract. The prohibition against discrimination is absolute; not relative. The Constitution does not say that there shall be equal protection "except . . ."; it forbids discrimination. The attempt by a railroad to pass on directly to one group of its customers the surcharge-penalty feature of a private contract the benefits of which inure to *all* of its customers is not a rational classification under this Court's decisions.

As the record shows without dispute, Santa Fe's use of the Southern Pacific Mojave-Bakersfield track instead of building its own has been and is a benefit to all of its customers — not just to the shippers physically located upon such track. To illustrate: if Santa Fe duplicated the Southern Pacific track and built its own Mojave-Bakersfield track, could it lawfully levy the capital cost of such track solely against shippers located on such track? Of course not! Such a cost must be spread against all traffic that moves over such track.

We repeat, the supposed distinction between shippers and localities upon the joint track and other similar shippers and locations does not have "a fair and substantial relation to the object" of rate-making — the

creation of a compensatory, non-discriminatory rate structure. Instead, it rests upon the quicksand of the railroads' contract language, hammered out in private bargaining sessions. Such a situation (and the State's sanction thereof) is repugnant to the Fourteenth Amendment.

2. As we have shown, the decision below is directly opposed to this Court's decisions applying the equal protection clause to strike down distinctions without a difference. It is also in direct conflict with half a century of this Court's decisions in the area of federal transporation law, as crystalized in *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169.

The relevant facts of the *Baltimore & Ohio* case were these. A stockyard's company owning a segment of railroad track linking up portions of a railroad owned spur affording access to private sidetracks, permitted its use by the railroad for the transportation of livestock to packing house sidetracks only upon condition that it be paid an amount (as rental) equal to its fee for receiving and unloading such shipments. This Court struck down such arrangement, stating: (333 U.S. 169, 175)

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, New York v. United States, 331 U.S. 284, 296, 91 ed 1492, 1507, 67 S Ct 1207, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co. 323 US 612, 616, 89 L ed 499, 506, 65 S Ct 471. It would be

> strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation . . ."

The Court then pointed out that *all* discrimination is prohibited, and that indirect discrimination by contract is no excuse, stating: (333 U.S. 169, 176-177)

> "It is just as prejudicial to shippers and the public for a railroad that uses a portion of track under lease or contract to discriminate, as it is for the discrimination to be inflicted by a railroad which owns the entire track . . .
>
> ". . . The excuse offered by the railroad is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination."

It would be superfluous for petitioner to argue in extenso the analogy between the discrimination which offends the Interstate Commerce Act and the discrimination which offends the constitutional guarantee of equal protection of the laws. Plainly, a factual situation which would offend the Interstate Commerce Act if the commerce were interstate, violates the constitutional guarantee when the factual context is state approval of acts in intrastate commerce by interstate railroads.

The plain principle of the *Baltimore* case is controlling here — however a railroad may phrase its contracts for track rental, it may not use such contractual conditions to justify a discrimination between its customers. And state action, approving such discrimination, is automatically indicted under the Fourteenth Amendment.

Other cases have reached the same result as *Baltimore*. Thus, in *Virginian Railway Co. v. United States,* 272 U.S. 658, this Court struck down the accidental discrimination caused by the operation of a joint trackage agreement, stating that the crucial fact was the discrimination and the contract was "not of legal significance" (272 U.S. 658, 664-665).

So, too, as the Interstate Commerce Commission pointed out in *Huerfano Coal v. Colorado & Southeastern et al.,* 41 I.C.C. 657 at 659:

> "Trackage arrangements have been considered by the Commission in a number of cases, in none of which have we ever allowed the contracting carriers under cover thereof to work unjust discrimination against shippers or localities."

3. The Interstate Commerce Commission twice passed upon the 1912 Southern Pacific-Santa Fe contract in denying the use of such surcharge-penalty provision to justify discriminatory *interstate* rates.

In the first case, *Monolith Portland Cement Company v. Santa Fe,* 169 I.C.C. 689, the Commission refused to consider the contract, holding it not to be in issue, when determining whether cement rates from Monolith to Nevada (primarily cement for Boulder Dam construction) were discriminatory when compared with

rates from other Southern California cement plants (including the rates from Victorville, California, one of the group plants here involved).

In the second case, *Blue Diamond v. Santa Fe*, 171 I.C.C. 175, the Commission held that notwithstanding such track rental formula, gypsum rates from Arden (Las Vegas) Nevada, to Monolith, California, were discriminatory to the locality Monolith to the preference of other Southern California gypsum consuming points which were not located upon the tracks involved in this joint trackage agreement.

However, notwithstanding such explicit refusal by the Interstate Commerce Commission to base *interstate* rates upon the Santa Fe-Southern Pacific arrangement, the California Commission erroneously assumed that the I.C.C. had "approved" the contract, and that such assumed approval is justification for imposing, discriminatory *intrastate* rates. (Opinion, p. 59.)

4. The decision below sets at naught the national transportation policy of non-discriminatory transportation rates. The legislative history of the Interstate Commerce Act "shows clearly that the evil of discrimination was the principal thing aimed at." *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 749-750.

Here, while the jurisdiction over the railroads' trackage contract is possessed by the Interstate Commerce Commission, the power over intrastate rates is possessed by the state. May the state, contrary to the record, "presume" in advance the Interstate Commerce Commission's "approval" of a principle contrary to the decisions of this Court and the Commission, and so thwart national policy?

We respectfully submit that the Equal Protection clause is peculiarly appropriate to reach such state action so at variance with fundamental notions of equal treatment to those equally situated. ". . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand." *Hill v. Texas*, 316 U.S. 400, 406.

Conclusion.

For the reasons stated, this petition for certiorari should be granted, the order below reversed, and the case remanded for disposition in accordance with the Fourteenth Amendment, and the example of *United States v. Baltimore & O. R. Co.*, 333 U.S. 169.

Respectfully submitted,

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APPENDIX.

Order Denying Writ of Review.

In the Supreme Court of the State of California, in Bank. S. F. No. 21603.

Monolith Portland Cement v. Public Utilities Commission.

Filed June 16, 1964, William I. Sullivan, Clerk.

Petition for writ of review denied.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 22nd day of June A.D. 1964.

William I. Sullivan, Clerk
By G. E. Bishel.
Deputy Clerk

Gibson
Chief Justice

E COPY

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SEP 22 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a Corporation,
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Respondents.

Brief of Respondents in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a Corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. McKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission,
Respondents.

Brief of Respondents in Opposition

The Public Utilities Commission of the State of California (hereinafter referred to as Commission) and William M. Bennett, Peter E. Mitchell, Everett C. McKeage, George G. Grover and Frederick B. Holoboff, as members of and constituting said Commission, Respondents, for their statement in opposition to Petition for a Writ of Certiorari of Monolith Portland Cement Company, Petitioner (hereinafter referred to as Monolith), respectfully show the following:

I.

STATEMENT OF FACTS

The Commission is the fully constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies. (Section 17, 19-23a of Article XII of the Constitution of California: the Public Utilities Act, Statutes 1915, Chapter 91, as amended: and the Public Utilities Code, Statutes 1951, Chapter 764 as amended).

The Atchison, Topeka and Santa Fe Railroad Company (Santa Fe), Real Party in Interest, is an intrastate and interstate carrier of freight and passengers by railroad.

The proceeding now before the Court, as limited by Petitioner, was commenced by a Commission investigation into the lawfulness of cement rates charged by Santa Fe from certain cement plants. (Petition, page 8, Appendix "A"). The rail points involved were: Oro Grande (American Cement Co.), Victorville (Southwest Portland Cement Co.), and Cushenbury (Permanente Cement Co.) in the State of California to the California Aqueduct System of the Feather River Project in the San Joaquin Valley as far north as Merced, California. The pertinent facts are set forth in detail in Commission Decision No. 66487, reported in 62 California Public Utilities Reports 49.[1]

Monolith filed with the Commission a petition requesting suspension of the cement rates that had been filed by Santa Fe. The rates were suspended and after seven days of public hearings the Commission issued said decision. Thereafter, a petition for writ of review was filed with the Supreme Court of California, which was denied without opinion on June 22, 1964.

---

1. (For convenience of the Court copies of said decision are being filed herewith.)

II.

STATEMENT OF ISSUES ON APPEAL

The sole question presented by Petitioner to the Court and to the California Supreme Court is:

> May common carriers, by agreement between themselves, prefer and discriminate between places and persons, similarly situated for the same transportation service and in so doing thereby deny Petitioner equal protection of the law and due process under the Fourteenth Amendment?

The Commission decision (62 Cal. P.U.C. 49, 59) contains no finding that the rates in question are preferential or discriminatory, in fact the findings are contra:

> "We find:
>
> The suspended rates are above out-of-pocket costs and are compensatory whereas the existing rates from Monolith to San Joaquin Valley points are already below out-of-pocket costs and hence are already not compensatory and are insufficient; and by reason of the foregoing, the suspended rates are not unreasonably low in relationship to the rates from Monolith to San Joaquin valley points; *they do not grant an undue preference or advantage* to American Cement Corporation, Permanente Cement Company and Southwestern Portland Cement Company; *or subject Monolith Portland Cement Company to any undue prejudice or disadvantage* in connection with the transportation of bulk cement from their respective plants to San Joaquin Valley points; and *the suspended rates do not unjustly discriminate against Monolith Portland Cement Company or the locality of Monolith* in connection with transportation of bulk cement to San Joaquin Valley points." (Emphasis added.)

III.

ARGUMENT

The question presented to this Honorable Court is merely a broad and far fetched attempt to state a Federal Consti-

tutional question claiming that Petitioner has been deprived of equal protection of the law. Petitioner blandly states it has been denied equal protection of the law under the Fourteenth Amendment to the United States Constitution, the California Constitution (Article XII, Section 21), and the California Public Utilities Code (Sections 453, 1757, 1760), but makes no mention as to exactly how the constitutional guarantee has been violated. Further, there is no specification of the Petitioner's property that has been alleged to have been confiscated. It is respectfully submitted, there is no constitutional question involved herein, and if there were it would have been explicitly stated before the Supreme Court of California and to this Honorable Court. Moreover, the question is entirely one of fact based upon the law of the State of California. This Court has long held that the regulation of intrastate railroad services is primarily the concern of the state.

North Carolina v. United States (1945) 325 U.S. 507, 511, 89 L.Ed. 1760, 1765.

It should ever be borne in mind that the Constitution of California, Article XII, Section 21, and the United States Constitution, Fourteenth Amendment, do not guarantee or seek to prevent *all* differences in rates between places but *only unreasonable differences or discriminations.*

Petitioner at no time specifically states wherein or how the decision is unreasonable or arbitrary. Discrimination based upon reason can properly and legally exist.

Cal. Portland Cement v. Public Utilities Commission, 49 Cal. 2d 171, 315 P.2d 709.

The actual fact is Petitioner does not have a disadvantage in competing for business at the San Joaquin Valley points.

What it is attempting to do is maintain its heretofore existing advantage of rates from 6½ to 7½ cents per 100 pounds rather than the advantage of rates 3 cents lower than those from the same area resulting from rates authorized by the Commission's decision now before the Court.

The attention of the Court in this regard is directed to the Commission's decision herein 62 Cal. P.U.C. 49, at page 59. The table sets forth clearly and demonstrates the fact that Petitioner still has a rate advantage. Taking the table, to show the out-of-pocket costs from Petitioner's plant and excluding the 5:1 cents per 100 pounds penalty paid by Santa Fe to Southern Pacific Company, Monolith still has a rate advantage over the other points in question of 3 cents per 100 pounds. With this 3 cent advantage nevertheless Petitioner claims it is discriminated against and the rates in question are preferential.

Does this unchallenged fact result in unequal protection of law?

As stated in *Anchor Coal Co. v. U.S.*, 25 F.2d 462, 471, how can a competitor who is the complainant be injured by a rate higher than his rate?

IV.

MILEAGE IS NOT A PARAMOUNT FACTOR

Petitioner contends that mileage must be the paramount consideration or discrimination will result. Mileage is but a single factor entering into a composite and intricate picture in fixing railroad rates. The rates from Petitioner's plant are lower but the rates on a mile-for-mile basis are higher; however, this does not amount to discrimination or unequal protection of law.

Discrimination, or as sometimes stated, undue prejudice or undue preference, is a question of fact to be determined

in the light of all relevant circumstances by the proper regulatory agency which in this case is the Commission.

Texas and Pacific Railway v. I.C.C., 162 U.S. 197, 219, 40 L.Ed. 940;

U.S. v. Louisville and N. R. Co., 235 U.S. 314, 320, 59 L.Ed 245;

Nashville C. and St. L. R. Co. v. Tennessee, 262 U.S. 312, 67 L.Ed. 996;

Calif. Portland Cement v. Southern Pacific Co., 35 Cal. R. C. 904, 906.

It has long been the practice of railroads by statute and with the approval of regulatory bodies to fix a lower per mile basis for rates involving longer hauls as compared to shorter hauls, providing the rate for the longer haul is not less than the rate for a shorter haul over the same line. Examples of this are:

California Constitution, Article XII, Section 21;
California Public Utilities Code, Section 460.

What is an undue or unreasonable preference or advantage is a question of fact.

Pennsylvania Co. v. United States, 236 U.S. 351, 59 L.Ed. 616.

The findings and conclusions of the Commission on questions of fact are final and not subject to review. The party claiming confiscation or unreasonable preference has the burden of proof.

Sutter Butte Canal Co. v. Railroad Comm., 279 U.S. 125, 79 L.Ed. 637;

Los Angeles G. & E. Corp. v. Railroad Comm., 289 U.S. 287, 305, 77 L.Ed. 1180, 1192;

Calif. Public Utilities Code, Section 1757.

A statutory discrimination will not be set aside under the Fourteenth Amendment if any state of facts may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 6 L.Ed. 2d 393.

To fix railroad freight rates solely on a mileage basis as Petitioner desires, if applied to transportation between California and points throughout the United States, would be a disaster to the economy of the state.

V.

JOINT TRACK AGREEMENT OF 1912

By the terms of the 1912 agreement, the section of track between Mojave and Bakersfield, California, is owned by Southern Pacific Company and is to serve Santa Fe only as a "bridge". It is further provided that Santa Fe is prohibited from soliciting traffic originating or destined thereon and can do no business on this track unless required to do so by law. If Santa Fe does any business on the so-called "bridge", it must pay to Southern Pacific Company 60 per cent of the rate which in the case of cement is 5.1 cents per 100 pounds as a penalty. Santa Fe as a public carrier is required by law to accept and deliver all freight tendered to it for pickup and delivery on the "bridge". Petitioner's cement plant being located upon the Southern Pacific Company track is in reality a Southern Pacific Company rail-point, but because of the agreement for the joint use, Santa Fe is required by law to serve Petitioner.

Petitioner contends that because of the 1912 agreement between Southern Pacific Company and Santa Fe for the joint usage of the track between Mojave and Bakersfield, 60 per cent of the local rate payment is the result of a private agreement voluntarily entered into, and that the

Monolith rates are compensatory because the 5.1 cents per 100 pounds paid by Santa Fe to Southern Pacific Company cannot be considered a proper cost. This contention is based upon the established rule of law, with which we agree, that a shipper's legal rights cannot be disregarded because of agreements between carriers voluntarily made. However, this rule and the cases cited by Petitioner (pp. 13-16) are concerned only with the division between carriers of joint rates and are not in point.

The case of *United States v. Baltimore & O.R. Co.*, 333 U.S. 169, 92 L.Ed. 618, upon which Petitioner so heavily relies is readily distinguishable from the case now before the Court. The *Baltimore* case involved the effect of a railroad's contract with a union stockyard, owners of a side track, as to the alleged discriminatory refusal of the railroad to carry livestock of third persons over the track because of certain conditions of the contract compelling that course of action. It was held that the order of the Interstate Commerce Commission requiring the railroad to operate the track without discrimination, founded upon an act of Congress providing that no railroad should engage in certain types of discriminatory conduct, was not invalid as depriving the stockyard company of its property without due process of law. The opinion explains that there is no depriving of an owner of property without due process of law in denying him "the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads" *so as to secure equality in the treatment of those whom the railroad serves.*

This is not the situation in the case now before the Court. Here we are not concerned with a division of joint rates between carriers. A division of joint rates is where the par-

ticipating carriers divide the revenue resulting from a joint through rate.

When the carriers cannot agree upon a division, the Commission by Public Utilities Code, Section 733 and the I.C.C. by Section 15(6) of the Interstate Commerce Act are given the authority to fix the division of revenues, but there is no division of revenue involved here.

A carrier's division of a joint rate is the revenue accruing, which it receives for *performing part of the service* covered by the joint rate.

New England Divisions, 85 I.C.C. 482, 492.

Petitioner completely ignores the fact that Southern Pacific Company does not perform any part of the transportation service, yet it is entitled to the penalty payment provided in the 1912 contract. Upon this fact alone the matter now before the Court must be distinguished from a case involving the division of rates. As the Commission's decision points out, we are not concerned with joint rates and the 5.1 cents is not a division of revenue. It is a penalty paid by Santa Fe for doing business on the joint track or "bridge".

In re Southern Pacific Co., 1 California Railroad Commission 470, 471, the Commission approved the 1912 contract and stated:

> "The representatives of the applicants were closely questioned but nothing was developed to disclose or indicate anything unfair to any of the parties to the agreement or injurious to the interests of the public. We believe that such joint operation and joint participation in upkeep, and other expenses will be of distinct advantage to applicants and without injury to any one. While in many cases of this kind the Commission will desire to investigate the value of the property leased, to ascertain the reasonableness of the rental price, we

do not deem such investigation necessary in this case. We recommend that the prayer of applicants be granted; that the agreement or contract as to the joint operation of this line or road in question be approved and that an order be issued authorizing such joint operation, and we submit herewith a form of order."

The Interstate Commerce Commission (I.C.C.) has had exclusive jurisdiction over the 1912 agreement since 1920. When the agreement by its terms expired January 1, 1962. Southern Pacific Company and Santa Fe were unable to reach a new agreement. Until a new agreement is reached. Santa Fe is required to operate over the "bridge" under the same rates and conditions until otherwise authorized by the I.C.C. The existing situation is that Santa Fe does not have it within its rights or power to charge the local rates or conditions. Yet, this fact is exactly what Petitioner contends the Commission should disregard in fixing the new rates.

The most important fact that the Court should bear in mind is that the present rates from Monolith are below out-of-pocket costs and are not compensatory while the rates in question will be compensatory and above out-of-pocket costs. The Commission has specifically made this finding based upon the fact that Santa Fe's out-of-pocket expense includes 5.1 cents per 100 pounds because of the payment to Southern Pacific Company for any shipment from Petitioner's plant at Monolith to San Joaquin Valley points. The 5.1 cents is a real, existing expense that has been approved by the I.C.C. and the Commission. If Santa Fe were required to reduce these rates from Monolith such rates could be assailed as confiscatory.

VI.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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Dated: September 21, 1964.

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IN THE

Supreme Court of the United States

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Respondents.

REPLY FOR PETITIONER.

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Respondents.

REPLY FOR PETITIONER.

I.

Constitutional Question.

We do not propose to reargue the contentions advanced in the petition. However, several points suggested by Respondents merit brief comment. To place the matter in the proper perspective, it is necessary to understand the thrust of the constitutional question raised by the petition.

As the California Commission's Opinion acknowledges:

> "Inasmuch as Respondent [Santa Fe] has suggested *no* other differences in transportation circumstances and conditions between the points involved and because Monolith and Santa Fe vigorously disagree regarding the competency, relevancy and materiality of the expense [contract], it is necessary to consider . . . the contract . . ." (Emphasis added). 62 Cal. P. U. C. 49, 56.

Respondents do not and cannot challenge petitioner's showing that the sole predicate for the questioned rates was the California Commission's conclusion that the Southern Pacific—Santa Fe surcharge-penalty arrangement might lawfully be directly assessed exclusively against shippers on the leased track (such as petitioner) resulting in the approval of what would otherwise clearly be discriminatory rates in favor of petitioner's competitors.

It is this naked conclusion that petitioner challenges as being constitutionally invalid as a denial of equal protection of the laws, and of due process.

The parties are in accord as to the power of a state to make rational legislative classifications stemming from a difference between rate-payers having a fair and substantial relation to the object of the legislation—in this case, the evil of discriminatory rates.

The question is, are unequal rates for equal service, which would otherwise be unlawfully discriminatory, redeemed by the peculiarities of the railroads' joint trackage agreement? That is, does such a classification as the California Commission has made rest upon a

ground of difference having a fair and substantial relation to the object of transportation rate regulation; or, is it arbitrary, subject as it is to the vagaries of the railroads' private arrangement with each other which produces inequitable rates?

II.

Respondents' Contentions.

A. *Respondent Commission speciously argues that petitioner is not disadvantaged or injured by the drastically reduced rates granted exclusively to petitioner's competitors, since petitioner still has an absolute rate advantage of 3 cents per 100 pounds on shipments to San Joaquin Valley points.* (Brief, p. 5). Competition at work contemplates that the more distant producer pay higher rates and accept lower profits to extend its natural market, thereby recognizing the natural competitive advantage of a producer in its own area. What the Commission has sanctioned is the abrogation of natural market competition and the substitution of a hidden subsidy to petitioner's competitors, who may now artifically expand their market at petitioner's expense. The Commission candidly concedes [62 C. P. U. C. 49, 50] that this is "such type of case."

B. *Respondent Commission asks rhetorically how a competitor who is the complainant could be injured by a rate higher than his rate?* (Brief, p. 5). The answer lies in the fact that, as the Interstate Commerce Commission has consistently held,* the lower rates are

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*E.g., *Northern Potato Traffic Assoc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 178 I. C. C. 237, 245 (1931); *Milk & Cream to New York City*, 45 I. C. C. 412 (1917); *Elk Cement & Lime Co. v. Baltimore & Ohio R.R. Co.*, 22 I. C. C. 84 (1911).

higher in the relative sense, that is, when distance is considered, and thus result in prejudice. Such situation is but a variant of the rule that unlawful discrimination results from charging unequal rates for equal service. *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627, 656. Certainly a carrier ought not to be free to deprive a shipper of equal treatment in the matter of rates merely because the shipper possesses a natural competitive advantage of proximity to the common market,** which the carrier desires to eliminate.

C. *Respondent Commission argues that petitioner seeks use of mileage alone as the exclusive rate-making factor.* (Brief, pp. 5, 7). Not so!

What petitioner contends is that in evaluating the "composite and intricate picture in fixing railroad rates" (Commissioner's Brief, p. 5), a holding that otherwise discriminatory rates for similar transportation services are constitutionally innocuous cannot be justified solely because of a trackage agreement between two railroads calling for a surcharge-penalty. Petitioner submits that such voluntary act of the railroads is neither relevant nor material in fixing lawful rates. That is, though irrelevant in rate analysis, it is critically relevant, indeed repulsive in legal effect when it blatantly penalizes freight originating on the joint track.

**Meridian Traffic Bureau v. Southern Ry. Co., 60 I. C. C. 5, 11 (1920); *Mayor and City Council of Douglas, Ga. v. Atlanta, Birmingham & Atlantic R.R. Co.*, 28 I. C. C. 445, 450 (1913); *Allen Manufacturing Co. v. Nashville, Chattanooga & St. Louis Ry. Co.*, 98 I .C. C. 405, 407 (1925).

D. *Although both the Commission (Brief, p. 6) and Santa Fe (Brief, pp. 9-10) apparently argue that the California Commission's ultimate "findings" of non-discrimination are insulated from judicial review, such argument is misplaced.*

First, California Public Utilities Code, Section 1760 explicitly provides that:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court *shall exercise* an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question *shall not be final.*" (Italics ours).

As the California Supreme Court has pointed out, *Southern California Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 744, such provision for independent judicial review of the law and the facts when an order was challenged on federal constitutional grounds, was no doubt enacted to cure the fact that standing alone, Section 1757 (relied upon by Respondents here), was unconstitutional under the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287.*

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*This necessary provision for judicial review of constitutional questions, unfettered by so-called "findings" phrased in the language of the statute, has long been the rule with regard to decisions of the Interstate Commerce Commission. *Interstate Commerce Comm. v. Illinois C. R. Co.*, 215 U. S. 452, 470, as the cases cited by Respondent Commission (Brief, p. 6) acknowledge.

Second, it is well established that if an ultimate finding on non-discrimination is premised on an erroneous view of the law (as petitioner urges is the case here), such finding cannot stand. *California Portland Cement Company v. Public Utilities Commission*, 49 Cal. 2d 171, 175.

Finally, where, as here, the evidence is undisputed, and because of constitutional safeguards a conclusion justifying discriminatory rates cannot be drawn, such conclusion is plainly not entitled to finality. *Southern Pacific Company v. Public Utilities Commission*, 41 Cal. 2d 354, appeal dismissed, 346 U. S. 919.

E. *Respondent Commission seemingly argues that the doctrine of United States v. Baltimore & O. R. Co., 333 U. S. 169 is limited to cases involving the division of joint rates* (Brief, pp. 7-9). Compare this Court's sweeping language in *Baltimore* (which was not a joint rate division case) that:

> "But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination."

So, here, the command of the California Constitution and statutes against discrimination cannot be subordinated to the command of the railroads' joint track arrangement.

It is undisputed that the 1912 contract has expired and that the railroads, by mutual agreement, are merely miantaining the *status quo* pending the resolution of their controversy over track rental, and that any new track rental arrangement is expressly made retroactive to January 1, 1962. Thus, if the penalty-surcharge

feature is eliminated by the Interstate Commerce Commission on the merits (as it well may be), such holding will be retroactive, thus destroying the asserted factual basis for the rates assailed here. That is, the pivot on which the challenged rates turns is still *sub judice*. Yet, under the California Commission's Opinion, petitioner is required to bear such penalty as a part of its current rate, with no provision for remission if the penalty is stricken down by the Interstate Commerce Commission.

F. *Respondent Santa Fe argues that the Southern Pacific-Santa Fe track arrangement provides that Santa Fe may use the track only to "bridge" traffic and that the additional penalty provided when traffic is originated on the track is typical of many joint trackage agreements (Brief, pp. 5-6).** Respondent Commission asserts that Santa Fe pays "a penalty . . . for doing business on the joint track or 'bridge'" (Brief, p. 9). But this is a patent misconception of this situation.

The Mojave-Bakersfield track owned by Southern Pacific and utilized by Santa Fe as "required by law" is not a spur, or a small isolated track adjoining or subsidiary to a principal right of way. Rather, it is part and parcel of the "main line" from Southern California to and through the San Joaquin Valley and points north. Santa Fe wanted the transportation business from these commercially fecund areas of a rich producing and consuming state. To obtain such, it forebore the expense of constructing its own track as Southern Pacific had done. Rather, it bought the

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*Even if true, this would not justify a rate discrimination (absolute or relative) where the transportation service is the same.

use of Southern Pacific's tracks and fixed the consideration therefor in part in terms of traffic originating on the portion of the track which it did not possess. Fortuitously, petitioner is the sole significant shipper affected by this rate located on this portion of track. Factually, petitioner did not have a voice in the railroads' agreement which so drastically affected its established function as a *competing* cement producer. Most unfortunately, petitioner must suffer the impact of the burdens of Santa Fe's benefit, which ricochet as benefits to petitioner's competitors. In truth, Santa Fe is not penalized—in legal effect Santa Fe pays "consideration," petitioner pays the penalty. Santa Fe is gambling in the competitive transportation market with petitioner's chips, and petitioner is denied a seat at the table. To continue the analogy, petitioner contends that the Commission has misapplied the "rules of the game," and requests the Supreme Court to act in order to assure petitioner a "fair deal."

The crux of the matter is not the abstract validity of such a penalty-surcharge (although it is an anachronism in this case), but the constitutionality of justifying otherwise discriminatory rates to petitioner solely upon such a voluntary agreement, in which petitioner is an injured rather than an active party.

Petitioner does not request that Santa Fe be required to reduce rates from Monolith if, with due regard to constitutional dictates and transportation criteria, such reduced rates are found to be non-compensatory.* Pe-

*It should be noted that neither respondent had ever believed them to be non-compensatory until Santa Fe decided to leapfrog petitioner's competitors into petitioner's natural market area at petitioner's expense.

titioner goes beyond the question—begging of the non-compensatory issue, and urges the crucial constitutional issue—that equal rates for equal service are required by California law, and that the reduced rates deny to petitioner the equal protection of the laws and due process of law.

G. *Both Respondents argue that the challenged decision of the California Commission involves only the valid exercise of state regulatory power respecting intrastate rates.* This circuitous argument is, however, necessarily premised on the tacit assumption that the Commission's classification was reasonable and not arbitrary, and thus assumes the very question here in issue. As we have shown, there is compelling authority for the proposition that such classification is both irrational and repugnant to the basic purpose of the regulation of transportation rates.

Conclusion.

The petition submits an important question of transportation law, and as to the constitutional power of a state regulatory body to discriminate between citizens by a classification plainly repugnant to the basic purpose and object to the very legislation the regulatory body purports to enforce.

For the reasons stated in the petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Motion of The Atchison, Topeka and Santa Fe Railway Company To Correct Caption and To Be Named a Respondent and Brief for Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. MC KEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Motion of The Atchison, Topeka and Santa Fe Railway Company To Correct Caption and To Be Named a Respondent Herein

In the caption of this case as set forth in the petition for writ of certiorari, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) is not named as a respondent. The petition is essentially an attack upon a decision of the California Public Utilities Commission, upheld without opinion by the California Supreme Court, involving reduced freight rates of the Santa Fe. Santa Fe was a re-

spondent in the Commission proceedings and actively participated therein. By California statute Santa Fe is a real party in interest, entitled as a matter of right to participate in the review proceeding before the State Supreme Court and Santa Fe did actively participate.[1] It will be directly and substantially affected by the Court's action herein. The petition for writ of certiorari was served upon Santa Fe.

Wherefore, The Atchison, Topeka and Santa Fe Railway Company respectfully moves that it be designated a party respondent and that the title and caption of this proceeding be amended accordingly. The brief of this company as a respondent in opposition to the petition is attached.

Respectfully submitted.

FREDERICK G. PFROMMER
114 Sansome Street
San Francisco, California

Attorney for The Atchison, Topeka and Santa Fe Railway Company

Dated at San Francisco this 21st day of September, 1964.

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1. "The commission and each party to the action or proceeding before the commission may appear in the review proceeding." Section 1758, Public Utilities Code of the State of California. To the same effect is Rule 58(b) of the Rules on Original Proceedings in Reviewing Courts of the Supreme Court of the State of California.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. MC KEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition

OPINIONS BELOW

The opinion of the Public Utilities Commission of the State of California, which is really the subject of this petition, is entitled *Decision No. 66487, Case No. 7598*, and

is reported at 62 Cal. P.U.C. 49.[1] Printed copies of the advance sheet containing this opinion were filed with the petition.

The subject opinion of the Public Utilities Commission of the State of California (hereinafter called State Commission) shows that The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) was a respondent in the Commission proceedings. By California statute Santa Fe is made a real party in interest, entitled as a matter of right to participate in the eview proceeding before the State Supreme Court and Santa Fe did so participate. Santa Fe files this brief as a respondent here.

JURISDICTION

The petition invokes jurisdiction of the Court only under 28 U.S.C. § 1257(3) which applies where the validity of state action is challenged as repugnant to the Constitution, treaties or laws of the United States.

QUESTION PRESENTED

Although the petition is phrased to present a question whether the State can constitutionally sanction illegal discrimination, i.e., lower transportation rates for some shippers than for others similarly situated, the Commission's decision is clearly based on the factual ground that petitioner and "the other shippers" are not similarly situated and that the difference in rate treatment is justified.

Therefore, petitioner's statement of the case requires correction so that it reflects what the State Commission actually found to be the facts. Such restatement demonstrates that the petition is without basis.

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1. It will be hereinafter cited by volume and page only.

STATEMENT OF THE CASE

Reduced intrastate railroad rates were published by Santa Fe from certain cement plants but not from petitioner's plant. As a consequence petitioner's former rate advantage was reduced.[2] Upon its request, effectiveness of the reduced rates was suspended by the State Commission pending full investigation and determination whether the reduced rates would be unlawful in any respect. After seven days of hearing and due deliberation, the State Commission entered its opinion and order that the reduced rates had been shown to be lawful and permitting them to become effective. It denied petitioner's request for a rehearing and the Supreme Court of California denied a petition for writ of review.

Petitioner's plant is at Monolith, California, on railroad track owned by Southern Pacific Company (Southern Pacific) and over which Santa Fe has trackage rights by agreement with Southern Pacific. The agreement provides Santa Fe may use this track only to "bridge" traffic and if it originates or terminates traffic at points on this Southern Pacific-owned line, it must pay a substantial extra charge on such traffic in addition to the regular rental and other user charges which apply on all traffic moving on the line. Such provisions, imposing a penalty where the "tenant" railroad uses the leased line to originate or terminate traffic, as contrasted with "bridging" over it, are typical of many joint trackage agreements. For example, see *Burlington-R. I. R.R. Abandonment*, 247 I.C.C. 79, 82. In some instances, the user is prohibited from doing any local business on the joint track.

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2. It should be emphasized that its advantage was only reduced, not removed.

". . . [I]t was provided that the Pacific Company should do no business at intermediate points." *Union Pac. Ry. v. Chicago, R. I. & Pac. Ry.*, 163 U.S. 564 (1896).

Santa Fe published reduced rates on cement from mills located on its line. It did not reduce its rates from Monolith on the Southern Pacific-owned tracks because, as found by the State Commission (62 Cal. P.U.C. at 59), Santa Fe's rates from Monolith were already non-compensatory, being less than out-of-pocket costs.

Most of the decision of the State Commission is concerned with petitioner's contention that it would be unlawfully discriminated against or unlawfully prejudiced unless Santa Fe were required to publish reductions in its rates from Monolith on Southern Pacific-owned track commensurate with the reductions in rates Santa Fe proposed from the cement mills on its own track. The Commission did indeed observe that the *physical* transportation of cement from Monolith and from the other mills is comparable. But the Commission also pointed out that although the Santa Fe must pay Southern Pacific the additional charge when it originates traffic at Monolith, "[n]o such payment is required in connection with freight transported over the joint track that does not have origin or destination on the joint track." (62 Cal. P.U.C. at 57.) It described that extra cost as

> ". . . an out-of-pocket expense in that it is directly applicable to the shipments involved. Said expense is one that accrues in connection with shipments transported by respondent from Monolith and does not accrue in connection with shipments originating at Oro Grande and transported to destinations north of Kern Junction. That expense, therefore, is a condition of transportation of shipments from Monolith not present in the transportation of shipments from Oro Grande." (62 Cal. P.U.C. at 58.)

And it said,

> "We find: The suspended rates are above out-of-pocket costs and are compensatory whereas the existing rates from Monolith to San Joaquin Valley points are already below out-of-pocket costs and hence are already not compensatory and are insufficient; and by reason of the foregoing, the suspended rates are not unreasonably low in relationship to the rates from Monolith to San Joaquin Valley points; they do not grant any undue preference or advantage to American Cement Corporation, Permanente Cement Company and Southwestern Portland Cement Company; or subject Monolith Portland Cement Company to any undue prejudice or disadvantage in connection with the transportation of bulk cement from their respective plants to San Joaquin Valley points; and, the suspended rates do not unjustly discriminate against Monolith Portland Cement Company or the locality of Monolith in connection with transportation of bulk cement to San Joaquin Valley points." (62 Cal. P.U.C. at 59-60.)[3]

Having found that the subject rates were not unlawful when considered in connection with Monolith's rates to the same points, the State Commission then turned to Monolith's contention that the suspended rates into the San Joaquin Valley were unlawful when compared with Monolith's rates into southern California. It considered at some length that "[t]here are, however, differences in transportation circumstances and conditions which relate to comparisons of the suspended rates on mileage bases with the rates from Monolith to the southern points." (62 Cal. P.U.C. at 61.)

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3. Compare petitioner's grossly incorrect statement that ". . . . the Commission found as a fact that all the actual costs and circumstances of transportation were the same for petitioner as for its competitors." (Petition, page 5.)

It detailed the various differences and among other things, specifically said:

> "We find: . . . There are circumstances and conditions surrounding the transportation of cement from Monolith to southern points by respondent that are not similar to those surrounding the transportation of cement in bulk from Oro Grande, Victorville and Cushenbury to San Joaquin Valley points, including, the additional expense of 3.6 cents per 100 pounds on shipments originating at Monolith, the routing of shipments via Santa Fe under its local rates is not the shortest route from Monolith to many of the southern points involved herein, and the market for cement for the Feather River Project construction in the San Joaquin Valley is actual, whereas that market in the southern points area is potential." (62 Cal. P.U.C. at 63.)

And the Commission made further findings and concluded that there was no undue preference or prejudice nor unlawful discrimination and that the rates were justified by transportation conditions.

ARGUMENT

The petition specifies four numbered reasons why writ of certiorari should be granted: (1) the benefits of the agreement under which Santa Fe uses Southern Pacific tracks inure to all of the railroad customers and the extra cost incurred in originating traffic at Monolith "must be spread against all traffic that moves over such track"; (2) the state action is in conflict with decisions of this Court in the area of federal transportation law; (3) the Interstate Commerce Commission does not regard the extra cost at Monolith as justifying discriminatory rates; and (4) the state action violates national transportation policy.

1. Whether an Unlawful Discrimination Exists Is a Question of Fact and No Substantial Federal Question Is Involved.

The rates in question apply only on intrastate commerce. The State Court has said

> "Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 33 Sup. Ct. 893, 57 L.Ed. 1446, Ann. Cas. 1915A, 315. In dealing with the reasonableness of rates and permissible discrimination based upon differences of conditions, it is there said: 'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon a difference in conditions are not matters of law. . . .'" *Live Oak Water Users' Ass'n v. Railroad Comm'n*, 192 Cal. 132, 143, 219 Pac. 65, 69 (1923), writ of error dismissed, 269 U.S. 354 (1926). To the same effect, see *California Portland Cement Co. v. Public Util. Comm'n*, 49 Cal. 2d 171, 175, 315 P.2d 709, 711 (1957).

As suggested in the foregoing quotation, even if the matter were one of federal law the rule would be no different, for as this Court has recently said,

> ". . . differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar.' Whether those circumstances and conditions

are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination." *Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943).

The State Commission found as a fact that petitioner and its competitors were not in substantially similar situations and concluded that the rate differential was not unlawful. This finding having been made as a valid exercise of state regulatory authority respecting state rates, there is plainly no federal constitutional issue. Thus, while it is true that the decision may not be based on an arbitrary classification, neither does that principle provide a basis for reweighing the evidence. Petitioner's argument that the benefits of the trackage agreement inure to all the railroad's customers and that the extra cost of originating traffic at Monolith should not be charged against such traffic alone, but "must be spread against all traffic that moves over such track" is no more than a contention that the State Commission incorrectly weighed the evidence. The allegation of unconstitutionality is based on nothing more than the argument that the decision was wrong. No substantial federal question is presented. *Baltimore & O. R.R. v. United States*, 305 U.S. 507, 526 (1939); *Transamerican Freight Lines, Inc. v. United States*, 51 F.Supp. 405 (D.C. Del. 1943); *Lang Transp. Co. v. United States*, 75 F.Supp. 915 (S.D. Cal. 1948).

2. There Is No Support for the Argument That These Intrastate Rates Would Have Been Unlawful If Interstate and That, Therefore, Their Approval Violates the Constitution.

Petitioner argues that various federal authority holds that the present situation would constitute unlawful discrimination if in interstate commerce and

> "Plainly, a factual situation which would offend the Interstate Commerce Act if the commerce were interstate, violates the [federal] constitutional guarantee when the factual context is state approval of acts in intrastate commerce by interstate railroads." (Petition, page 14.)

In the first place, the cases cited by petitioner do not compel the conclusion that the Interstate Commerce Commission would have reached a different decision if it had this same case before it involving interstate rates. But this point was carefully argued before the State Commission and does not bear repetition at this stage.

Moreover, even assuming the I.C.C. would have reached a different conclusion, such fact would be immaterial, for this proceeding concerns a state order regulating intrastate rates as a valid exercise of the state power. The argument that State Commission action respecting intrastate rates is a deprivation of equal protection of the laws unless it reaches the same result the I.C.C. would have reached if the rates were interstate, is not supported by logic, let alone the Constitution. In the same category is the argument that certiorari should be granted because the state action involving intrastate rates violates "the national transportation policy of non-discriminatory transportation rates." These are merely tenuous arguments advanced in an effort to create a federal question where none exists.

CONCLUSION

Although petition alleges a violation of the federal constitution, the situation involves only the valid exercise of state regulatory power respecting intrastate rates. No substantial federal question is involved and the petition should be denied.

Respectfully submitted,

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